COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP331-CR **Cir. Ct. No. 2016CM31**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: JEFFREY S. FROEHLICH, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] Michael Johnson appeals from a judgment convicting him of possessing tetrahydrocannabinol (THC). He specifically takes

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

issue with the circuit court's denial of his motion to suppress evidence acquired after he consented to a search of the motor vehicle he was driving. He claims his consent was obtained during an illegal seizure of his person and was therefore invalid. We disagree and affirm.

BACKGROUND

¶2 At about 2:30 a.m. on December 19, 2015, Johnson, who was driving his mother's vehicle, passed Officer Robert Baldwin and failed to dim his headlights. Baldwin pulled him over and asked to see his driver's license and vehicle registration. After Johnson was unable to provide proof of insurance, Baldwin issued warning citations to Johnson for failure to provide proof of insurance and failing to dim the vehicle's headlights. He asked Johnson to step out of the vehicle while he explained the written warning citations. As the two talked, another officer arrived on the scene and waited behind the vehicles. After the stop concluded, Baldwin told Johnson he was free to go.

¶3 As Johnson turned to leave and started walking toward the vehicle, Baldwin called after him, "Wait, one more thing," and asked if Johnson had any drugs, weapons, or alcohol in the vehicle. Johnson said no. Baldwin then requested permission to search the vehicle. Although the parties dispute what happened in the ensuing conversation, Johnson ultimately agreed to the search.

¶4 The search revealed particles of marijuana in the vehicle. As Baldwin continued searching the vehicle, he noticed Johnson was shivering violently in the fifteen-degree weather and offered to let him warm up in the squad car. Before letting Johnson enter the squad car, Baldwin patted him down and discovered two bags of marijuana in the pocket of his pants. Johnson was arrested

and taken to the hospital for blood tests, which revealed a detectable level of THC in his blood. He was charged with possession of THC and drug paraphernalia.[2]

¶5 Johnson filed a motion to suppress on the grounds that his consent was obtained unlawfully. At the suppression hearing, the court heard two very different accounts of what occurred after Baldwin initially requested to search the vehicle.

¶6 According to Johnson, when Baldwin asked to search the vehicle, Johnson promptly replied, "No, it's not my car." Baldwin then explained that as the driver, Johnson could still consent to the search, and he requested permission again. Johnson refused. But, according to Johnson, Baldwin continued to press. After Baldwin's fourth request, Johnson explained, "I didn't feel like I could leave without obliging," so he consented to the search. Johnson stressed that, by repeatedly requesting to search the vehicle, Baldwin effectively seized Johnson because "no reasonable person would have felt free to leave when an officer refuses to take 'no' for an answer."

¶7 Baldwin painted a very different picture. When Baldwin asked Johnson for permission to search the vehicle, Johnson—without outright refusing—replied that the car was not his. The two then "had some conversation about the legalities of who can give the consent," and Johnson agreed to the search. Although Baldwin could not recall whether or not he had asked Johnson's

[2] The possession of drug paraphernalia charge was dismissed and read in. Johnson was also charged with operating a motor vehicle with a detectable amount of a restricted substance in a separate municipal court case. The operating charge is not before us.

permission again at the end of the discussion, he "never did get a 'no' from" Johnson.

¶8 Both parties agreed Baldwin did not raise his voice, change his tone, display his weapon, or physically touch Johnson, and the backup officer simply stood by, not participating in the interaction.

¶9 At the conclusion of the motion hearing, the circuit court noted several aspects of Johnson's testimony that made the court question his credibility and credit Baldwin's version of events instead. The court stated Johnson testified he was pulled over for a burned-out headlight, while Baldwin testified Johnson failed to dim his headlights; Johnson failed to remember specific questions asked of him that night; and he was under the influence of THC—a "hallucinogen"—at the time. The court concluded:

> So given all of that, the Court does not believe that [Johnson's] testimony is all necessarily accurate as to what went on that evening … the question was asked about drugs, weapons, and alcohol. The answer was no. Officer Baldwin then asked for consent to search the vehicle, and the explanation from Mr. Johnson is, well, it's not my car … it's not an unequivocal no ... the officer then explains that the operator can give permission … to have the vehicle searched and then either asked one more time or Mr. Johnson just said, yeah, go ahead and search.
>
> But at any rate, the time lapse that takes place during the course of this conversation is less than a minute.

Because the circuit court believed Baldwin's testimony, it held that Johnson's consent was not unlawfully obtained and denied the motion to suppress. Johnson subsequently entered a no contest plea to the possession of THC charge. His thirty-day sentence was stayed pending this appeal.

DISCUSSION

¶10 On appeal, Johnson claims "an otherwise routine traffic stop transformed into an illegal seizure when … Officer Baldwin refused to accept Johnson's initial refusals to search his vehicle" and when another officer joined them at the scene. Consent to the search was obtained while he was seized, he argues, therefore, the consent was invalid.

¶11 Whether a person is unlawfully seized under the Fourth Amendment is a question of constitutional fact. ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. We review questions of constitutional fact using the two-prong standard common to all Fourth Amendment claims: "The circuit court's findings of evidentiary or historical fact are upheld unless clearly erroneous. The determination of whether [the defendant] was 'seized' for Fourth Amendment purposes is reviewed de novo." ***Id.*** (citations omitted). Under the first prong of the test, we review whether the circuit court was clearly erroneous in its factual findings. ***Id.*** Pursuant to WIS. STAT. § 805.17(2), "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A fact is not clearly erroneous unless it is against "the great weight and clear preponderance of the evidence." ***Dickman v. Vollmer***, 2007 WI App 141, ¶15, 303 Wis. 2d 241, 736 N.W.2d 202.

¶12 On appeal, Johnson's argument relies heavily, if not entirely, on an interpretation of the record that conflicts with the factual findings of the circuit court—namely, that Baldwin made several requests to search the vehicle, and Johnson repeatedly refused. However, Johnson does not raise an argument that the findings of the circuit court were clearly erroneous. And even if he had, we see nothing in the record that would suggest the court's findings—that Baldwin

made one or two requests and Johnson made no outright refusal—were against the "great weight and clear preponderance of the evidence." Thus, we accept the circuit court's findings of fact and proceed to the second prong of the Fourth Amendment analysis.

¶13 Under the Fourth Amendment, a "search authorized by consent is wholly valid." ***Schneckloth v. Bustamonte***, 412 U.S. 218, 222 (1973). However, consent gained through an illegal seizure of the person is not valid consent. *See* ***United States v. Mendenhall***, 446 U.S. 544, 557-58 (1980).

¶14 "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Id.*** at 554 (footnote omitted). The analysis involves an examination of the totality of the circumstances. In ***Mendenhall***, the United States Supreme Court identified several circumstances that would lead a reasonable person to believe he was not free to leave.

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. (citations omitted). The court explained that "[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." ***Id.***

¶15 In this case, Johnson points to two circumstances which he believes transformed the contact into a seizure: the discussion preceding Johnson's consent

and the presence of more than one officer. The Wisconsin Supreme Court addressed similar circumstances in ***Williams***. In ***Williams***, the court concluded a number of factors, including "the tone, tenor, and rapidity of [the officer's] questioning; [and] the presence and stance of the back-up officer, whose squad lights were still flashing" were insufficient to cause a reasonable person to believe he or she was not free to leave. ***Williams***, 255 Wis. 2d 1, ¶¶30, 35. Though the officer in ***Williams*** asked the defendant a number of questions about whether he had drugs or alcohol in his vehicle, the court pointed out: "The questions were not accusatory in nature. The exchange was largely non-confrontational." ***Id.***, ¶31. Nothing about the questioning suggested compliance was required. ***Id.*** Furthermore, the court rejected the theory that the mere presence of an armed backup officer "always tips the scales toward a finding of a seizure," especially where the presence of the other officer could not be described as "threatening." ***Id.***, ¶32. Thus, the court concluded, a reasonable person would have felt himself or herself free to leave, and the interaction did not constitute a seizure.[3] ***Id.***, ¶35.

¶16 Similarly, nothing about Baldwin's behavior would have caused a reasonable person to believe he or she was not free to leave. Baldwin specifically gave Johnson permission to go and allowed him to start walking toward the vehicle he was driving before asking—in a normal, nonthreatening tone—if he had any drugs, weapons, or alcohol in the vehicle. Without displaying a weapon or making any physical or verbal show of force, Baldwin asked if he could search the

[3] In ***Williams***, the other factors the court weighed included the stance of the backup officer, the flashing lights of the other squad car, the location on a rural highway, and the time of night (2:30 a.m.). ***State v. Williams***, 2002 WI 94, ¶16, 255 Wis. 2d 1, 646 N.W.2d 834. Even considering these other elements, the court concluded the circumstances were not sufficient to cause a reasonable person to believe he was compelled to remain. ***Id.***, ¶35.

vehicle. Like the officer's questions in ***Williams***, the questions Baldwin asked were not accusatory; the two engaged in a nonconfrontational, explanatory conversation about consent. Baldwin's follow-up request—after explaining that Johnson could give his permission—did not transform the discussion from an innocuous interaction into a seizure. A reasonable person, following such a discussion, would still have felt free to leave. Like the backup officer in ***Williams***, the backup officer here had no part of the interaction and made no threatening gestures or took authoritative measures but rather did not participate. Under the totality of the circumstances, the inoffensive contact between Baldwin and Johnson did not amount to a seizure of Johnson's person.

¶17 Accepting the circuit court's findings of fact, Johnson was not illegally seized when he consented to a search of the vehicle. Therefore, we affirm the denial of his motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.